1803

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DAVID E. BURLEY,
Plaintiff in Error
vs.
THE UNITED STATES,
Defendant in Error
AND
CANYON COUNTY, IDAHO,
Defendant

No._____

BRIEF OF DEFENDANT IN ERROR.

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Defendant in Error, The United States, answering the brief of Plaintiff in error finds that the issues therein are narrowed down to two propositions of law which we will take up directly without discussing any of the facts, which appear sufficiently in the transcript for the purposes of this writ of error.

THE COURT DID NOT ERR IN OVERRULING THE DEMURRER OF THE DEFENDANT BELOW, TO THE AMENDED COMPLAINT:

No clearer statement of the plaintiff's right to condemn the lands in question could have been made than that set forth in the amended complaint:

Section 5216 of the Revised Codes of Idaho, provides, among others, as a necessary allegation in condemnation proceedings:

"A statement of the right of plaintiff."
and by reference back to Sec. 4168, same Codes, "in ordinary and concise language."

Plaintiff in error complains that the use of the word "primary," in connection with the necessity for the taking of the land sought, is uncertain and ambiguous and intimates that there is another and secret purpose not disclosed by the pleading which might preclude the government in its right to condemn.

It is difficult to see the force of such reasoning, the fact that the primary purpose for which the land was sought was for a public use was sufficient to establish the right; any ulterior or undisclosed purpose could not affect the defendant's rights and under no theory of the law of eminent domain could the plain-

tiff be called upon to show other than a public use sufficient to sustain its pleading, proof in conformity therewith being sufficient to establish the right. Any other purpose that might be involved could not be questioned in this suit and might remain secure in the bosum of the plaintiff.

The language of the complaint is as follows:

* * * "That the said reservoir is, at this time, in actual course of construction and when completed the water impounded by said reservoir will completely overflow the above described tract of land, and it has become necessary that the plaintiff herein acquire title to the above described tract of land, for use as a part of said reservoir site, and for such purpose the said plaintiff, acting through the Honorable Secretary of the Interior has been and now is desirous of purchasing and acquiring title in fee to said tract of land for the purposes aforesaid. That the Honorable Secretary of the Interior is authorized by law to acquire said lands by condemnation, and that in his opinion it is necessary and advantageous to the government that said lands should be so acquired. That said irrigation project is being primarily constructed for the purpose of supplying water for irrigation to arid lands in Ada and Canyon Counties in the State of Idaho, which are public lands of the United States and that more than 50,000 acres of the public lands of the United States will be supplied with water for irrigation, and reclamation from the said project by means of said Deer Flat Reservoir. That said above described land included in said reservoir is necessary for the use of the government in the construction of said project. * * *"
and reclamation from the said project by means of said Deer

Flat Reservoir. That said above described land included in said reservoir is necessary for the use of the government in the construction of said project. * * *"

The court will notice that the allegation as to the necessity of the land in controversy for the construction of the *reservoir* is specific and definite and the constitution of the State of Idaho declares that "reservoirs" are a public use:

Section 14, Article 1, Constitution of the State of Idaho:

"The necessary use of lands for the construction of reservoirs, or storage basins, for the purposes of irrigation, or for the rights of way for the construction of canals, ditches, flumes or pipes to convey water to a place of use, for any useful, beneficial or necessary purpose or for drainage or for the drainage of mines, etc. * * Is hereby declared to be a public use, and subject to the regulation and control of the State.

Private property may be taken for public use but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."

This section plainly discloses that the right sought here is a public use and that the government, the same as a corporation, or individual, is entitled to the benefits of this provision of the constitution and has proceeded to condemn this land in the manner prescribed by the statutes of the State.

The right of the government thus being established to appropriate and construct such a reservoir, the second compliance lies in the requirement of the constitution that it shall be for

irrigation purposes and thus we come to the wholly sufficient allegation that the waters thus impounded in the reservoir are primarily for the irrigation of the public lands of the United States, to-wit, 50,000 acres in Ada and Canyon County, Idaho. Webster in defining the word "Primarily" sets forth:

"Primarily—In a primary manner—in the first place—in the first intention—originally."

The constitution provides in the case of reservoirs that they shall be for the purpose of irrigation—The reservoir in itself is declared to be a public use—the question whether or not the water thus impounded is to be used for private or public lands cannot enter the controversy here. The constitution grants to the United States, the same as to any other corporation, the right to condemn for reservoir purposes and the only objection that can be made to the right of the government to construct this reservoir and to condemn land for the purpose would lie in the unconstitutionality of the Reclamation act under which it is constructing these works.

The statute only requires that the facts constituting the cause of action be stated in ordinary language and not only permits but requires that the statement be concise. Under this statute it is not required nor would it be good pleading to give a detailed description of each 40 acre unit in so large a tract. The exact location and description of the public lands to be irrigated has no material bearing on the rights of the plaintiffs

and the plaintiff's rights and powers would be exactly the same even if the lands to be irrigated were located in some other county or state so long as it is feasible to irrigate them from the proposed works, and if the use of the word "primarily" implies as suggested by the plaintiff in error, that there is a secondary or incidental purpose to irrigate private lands, such incidental benefit to private land in no wise impairs the power of the government to condemn as is shown by the authorities hereafter cited.

It is apparent that defendant's demurrer was properly overruled.

But even if the complaint were ambiguous or uncertain in the first instance, the plaintiff in error could not take advantage of such a defect at the present time. He did not stand on his demurrer but elected to answer and joined issue as to the public or private character of the land to be irrigated and went to trial on the merits, and if the complaint were defective in the particulars alleged in the first instance the defect has now been cured by verdict.

"After verdict ,defects in substance in the declaration are cured if the issue joined be such as necessarily required on the trial proof of the facts defectively or imperfectly stated or omitted; and the court will presume that the facts showing the right were proved."

Stanley v. Whipple, 2 McLean 35.

Estee's Pleading 4698.

Garland v. Davis 4 How (U. S.) 131, 145.

Brent Exrsof v. Bank of the Metropolis 1 Peb 89.

"Where the complaint contains the substantial averments of a cause of action though defective in form and certainty the defect is cured by verdict."

Estee's Pleadings 4698.

People v. Rains 23 Cal. 127.

School District v. Ross 4 Col. App. 493.

Aiken v. Collidge 12 Oregon 244.

Wild v. Railroad Co. 21 Oregon 159.

Harkness v. McClain 8 Utah 52.

The complaint in the lower court did not disclose that there were any other lands to be irrigated under the Deer Flat Reservoir other than the government public lands and there was no evidence introduced showing that such was a fact. That the plaintiff in error in his brief assumes such to be can in no way influence this court or bind this defendant in error as there is nothing in the record disclosing any other lands to be irrigated than the lands of the defendant in error.

The old irrigated lands under the New York Canal merely retained the water rights which they formerly had from that Canal and of which they could not be deprived in any event,

under the State Constitution; moreover no part of the land of plaintiff in error is taken or condemned for the New York Canal. It is the Deer Flat Reservoir and not the New York Canal which is in issue in this case, and the only showing in regard to private land in connection with the Deer Flat Reservoir is that there is about 45,000 acres of private land so located that it could be irrigated from that source, but there is no evidence of any agreement to irrigate this private land or that it ever will be irrigated by the government, but it does appear that the reservoir was constructed primarily for the irrigation of 45,000 acres of government land and that it is necessary to take all the condemned land for the irrigation of the government lands alone, regardless of whether any private lands are or are not incidentally benefited thereby.

But, conceding, for the sake of argument, that there were other lands of a private nature that might be irrigated, or could be irrigated, incidentally with the public lands, we still maintain that this would in no way preclude the right of condemnation. We quote from your honor's decision in the case of Walker vs. Shasta Power Company 160 Federal 861 C. C. A. No. 1, 501:

"But in that case (referring to decision in Berrien Springs Water P. Co. vs. Berrien Circuit Judge, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438) the court sustained the doc-

trine that land can be taken under the power of eminent domain for a legitimate purpose, even though a private purpose will be thereby incidentally served."

The matter of incidental private benefit is well discussed in Sisson v. Buena Vista County (128 Iowa, 442; 104 N. W., 454; 70 L. R. A., 440.)

"So, also, a moment's consideration will serve to make it clear that controlling effect cannot be given the fact, however apparent it may become, that the construction of a particular improvement will result incidentally in benefit to private rights and interests. If the contrary were true, it is doubtful if there could be prosecuted any public work requiring an exercise of the power of eminent domain. Not a milldam, canal or railway intended to be operated by private corporations for private gain could be built, however necessary to the public convenience or welfare, not even a schoolhouse site or ground for cemetery, park, market house, street, or highway, could be acquired, although intended to remain under control of public authority, and for the undoubted use and benefit of the public, without making disclosure of influence, more or less marked, upon private rights and property interests." Bankhead v. Brown, 25 Iowa, 540; Township Bd. of Edu. v. Hackman, 48 Mo. 243. Perhaps no nearer approach to accuracy in the way of a general statement can be had than to say that the man-

date of the constitution will be satisfied if it shall be made reasonably to appear that to some appreciable extent the proposed improvement will inure to the use and benefit of parties concerned, considered as members of the community or of the State, and not solely as individuals. While, however, the benefit must be common in respect of the right of use and participation, it cannot be material that each user shall not be affected in precisely the same manner, or in the same degree." Coster v. Tide Water Co., 18 N. J. Eq. 54; Ross v. Davis, 97 Ind. 79; McQuillen v. Hatton, 42 Ohio St. 202; Pocantico Waterworks Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Lewis Em. Dom. Sec. 161."

Another illustration of the legal principals governing cases in which there is a mixture of public and private purposes is found in the decision of the courts in regard to the constitutionality of a tariff law which is passed for the double purpose of:—

1. Raising revenue for the support of the government.

2. Giving protection to a home industry.

The first is a public purpose. The second is a private purpose as defined by the Plaintiff in Error. No legislation has had more consistent, bitter and determined opposition, but no law of this character has been declared unconstitutional, not-

withstanding some of them have been enacted solely for the second purpose above stated—protection—without the expectation of, or desire to, raise a revenue thereby.

The decisions of the courts on this question are briefly and clearly stated by Judge Cooley in the following words:

> "But if any income is derived from the levy, the fact that incidental protection is given to home industry can be no objection to it, for all taxes must be laid with some regard to their effect upon the prosperity of the people and the welfare of the country, and their validity can not be determined by the money returns. This rule has been applied when the levy produced no returns whatever, it being held not competent to assail the motives of Congress by showing that the levy was made, not for the purpose of revenue, but to annihilate the subject of the levy by imposing a burden which it could not bear."
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> (Cooley Prin. of Constitutional Law, p. 57.)
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> Veazie Bank v. Fenne, 8 Wall, 533.
>
> Story on Constitutional Law, par. 965.

THE CONSTITUTIONALITY OF THE RECLAMATION ACT.

The only remaining question raised upon this review is the constitutionality of the reclamation act. We will not discuss

this matter further than to cite and rely upon the recent case of this circuit upholding the act in question.

United States vs. Hanson 167 Fed. page 881.

The right to condemn is incidental to the powers granted to the Federal Government and exists in the Federal Government even without the addition facilities provided by state legislation.

United States v. Gettysburg Electric Ry. 160 U. S. 668-681.

If the Court concludes as we think it must that the record discloses no finding that any private land will be irrigated from Deer Flat Reservoir, then there is no need to go beyond the Hanson case which covers the present case in every particular, but even if the court should be of the opinion that there is some evidence that some private land would receive an incidental benefit, that is only the usual condition which applies to practically every public work of any importance and is a condition which does not injure the defendant in error in any particular as his condemned land must all be taken in any event for the irrigation of the public lands of the United States. The State and Federal courts of the United States including your honor's court are practically unanimous in holding that such an incidental benefit to private interests is no objection to

the exercise of the power of eminent domain.

For the purposes of this case it is not necessary to go farther than to say that the power of the government to improve its own lands is fully affirmed by this court in the case of United States v. Hanson and the fact that an incidental benefit to private property is no bar to the exercise of the power of eminent domain is likewise fully determined by this court and numerous other authorities in the cases above cited.

KANSAS VS. COLORADO.

This case (206 U. S., 46), which contains a reference to the Reclamation Act and some discussion of the Act by way of illustration, is cited by defendant in support of his argument. We look upon the case as upholding the Government's contention herein.

Quoting from the case of *Fairbank v. United States* (88 U. S., 283-288), in regard to the construction of the language granting powers to Congress, to the effect that the rule of construction concerning the powers granted being such as to enable Congress to carry them into full effect, should be equally operative in regard to prohibitions or limitations on such powers, it was said that "the true spirit of constitutional interpretation in both directions is to give full liberal construction to the language, aiming ever to show fidelity to the spirit and purpose." (p. 91.)

The Reclamation Act is cited to illustrate this. It is shown that at the time of the adoption of the constitution there were no large tracts of arid land within the known and conceded limits of the United States and that there was no specific provision for national control of the arid regions or their reclamation.

As the public domain was extended, large areas of arid lands were brought within the limits of the United States and it is stated in regard to the reclamation of such arid lands by the United States that if no such power has been granted none can be exercised. Thereupon the court proceeds:

> "It does not follow from this that the national government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of section three of article four heretofore quoted, or by virtue of the power vested in the national Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the constitution, and, therefore, it may legislate in respect to all arid lands within their limits. At least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. *We do not mean that its legislation can override State laws in respect to*

> *the general subject of reclamation.* While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. *Nor do we understand that hitherto Congress has acted in disregard to this limitation.*" (p. 92.)

(The emphasis is ours.)

Following this, the court quotes from the case of *Gutierres v. Albuquerque Land Company* (188 U. S., 545-554,) in which Section 8 of the Reclamation Act is quoted as showing that Congress had carefully provided that nothing in the Reclamation Act should be construed as affecting or intending to affect or in any way interfere with the laws of any State or territory relating to the control, appropriation, use or disposition of water used in irrigation or any vested right acquired thereunder, thus indicating that the court considered that Congress had given proper consideration to the limitation of its power of interference with the legislation of States in such matters.

Every State named in the Reclamation Act has passed legislation specifically providing for co-operation with the United States in various phases of the work carried on under the Reclamation Act.

But if it is desired to go farther it will be found that on a number of other grounds besides the one set out above the federal government is authorized to construct the works in question and in connection therewith to condemn the land in issue in this case. This is true even if the *lands to be irrigated* were all together in private ownership.

These grounds may be set out as follows:

1st. That the people of the State of Idaho through their Constitution and the State through its Statutes acting within their undoubted province to exercise such control over real property within their jurisdiction, have granted the general Government full authority to take the land in question upon the payment of the value thereof. This is a power given to the general Government by the State and the people thereof authorizing it to exercise the powers of the State as a state agency, a power independent of and in addition to those vested in the general Government by the Federal Constitution, but derived from the same original source of power, a grant from the State and the people.

Section 14, Art. 1, Idaho Constitution.

Section 8, Art. 11, Idaho Constitution.

Section 1, Art. 15, Idaho Constitution.

Section 5210 of Idaho Code.

Section 5211 of Idaho Code.

Section 5212 of Idaho Code.

Section 1638 of Idaho Code.

Section 2842 of Idaho Code.

Section 2843 of Idaho Code.

Section 2398 of Idaho Code.

Section 2397 of Idaho Code.

Section 1583 of Idaho Code.

Page 70, Session Laws, Idaho, 1909.
Page 331, Session Laws, Idaho, 1909.

Potlatch Lumber Co. vs. Peterson, 12 Idaho, 769.

Green vs. Wilhite, 14 Idaho, 238.

This principal is discussed at length by the supreme court of California and is fully affirmed, and in the State of Idaho the early California decisions are recognized as of almost equal weight with the Idaho decisions.

Gilmer vs. Lime Point 18 Cal. 229; also

Reddall vs. Bryon 14 Md. 444.

"Property taken for the use of the general government is taken for a public purpose for which the state may exercise its power of eminent domain."

Lewis on Eminent Domain (3rd Edition) Par. 309.

2nd. That the irrigation of the arid and semi-arid sections of the United States comprising one-third of its area is a public purpose whether the land to be irrigated be in public or private ownership and one of such pre-eminent importance and general benefit as to be clearly within the power given to Congress by the Constitution to provide for the general welfare of the United States.

"To Provide for the general welfare of the United States."

Sec. 8 of Article 1, Constitution of U. S.

In the western states the use of water for irrigation purposes either for the irrigation of public or private lands is well settled by statute and judicial decisions to be a public use. This doctrine is well established in the State of Idaho.

Sec. 14, Art. 1, Idaho Constitution.

Section 1, Art. 15, Idaho Constitution.

Secs. 5210, 5211, 5212, Idaho Code.

Also by the supreme court of the U. S.

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112.

Hagar v. Reclamation District, 111 U. S. 701.

Clark v. Nash, 198 U. S. 361.

Strickland v. Highland Bay Co. 200 U. S. 527.

See also Reeves v. Wood County, 8 Ohio, 343.

Daggett v. Colgan 92 Cal. 53; 28 Pac. 51.

Bonds of Madeira Irr. Dist. 92, Cal. 296; 341; 28 Pac. 272; 14 L. R. A. 755.

See also United States v. Gettysburg El. Ry. 160 U. S. 668 to 681.

This principal was also considered by your honors to some extent in the case of United States v. Hanson and affirimed.

United States v. Hanson———Fed.———.

3rd. That whether the lands to be irrigated are in public or private ownership, the funds used for the construction of the irrigation works are all the proceeds of the sale of public lands and the power to sell by necessary implication includes the power to use the proceeds which power is given without limitation. Moreover, the Reclamation Fund is merely the medium of exchange by which certain public lands are disposed of and certain irrigation works are acquired in exchange and the words "dispose of" as used in Sec. 3, Art. IV of the Constitution include such an exchange.

Sec. 3 Art. IV U. S. Constitution.

Such fund is not limited as are the funds raised by taxation.

Judge Story in his Treatise on the Constitution, Vol. 2, p. 205;

Loan Association v. Topeka, 20 Wall 655.

4th. It is apparent from the record in this case that por-

tions of the reservoir site are now and have at all times been the property of the United States and also that 45,000 acres of the irrigable lands lying under said reservoir have been entered subject to the provisions of the Reclamation Act and therefore, have necessarily been entered since the Act of Congress of Aug. 30, 1890, 26 stat. L. 391, and subject to the provisions of that Act, that there is reserved across all of said lands rights-of-way for ditches and canals constructed under the authority of the United States.

> "That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."
>
> (Act of Aug. 30, 1890—26 Stat. L., 391.)
>
> Green v. Wilhite, 14 Idaho 238.

Regardless of whether the lands to be irrigated are in public or private ownership, such portions of the reservoir site and such reserved rights-of-way are the property of the United States which it is the privilege and duty of Congress to utilize in the most profitable, possible way for the benefit of the United States, which right necessarily includes the right to acquire intervening sections of right-of-way which are necessary in the

use of this property of the United States for the purpose for which it is reserved and adapted and the only purpose for which it can be used.

Congress has this power regardless of the ultimate use of the product whether lead or water.

United States v. Gratiot, 14 Pet. 526.

The choice of means rests with Congress.

McCullock v. Maryland, 4 Wheat 316, 407 to 423.

This power with respect to public lands is subject to no limitations.

Gibson v. Chouteau, 13 Wall 92.

Respectfully submitted,

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